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Report on the STM Activity (18th November – 8th December 2014)

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Legal and Political Relations between the EU, Ukraine and Russia

1. *Introduction*

The current Ukrainian crisis seems to highlight the complexity, ambiguity and contradictions of the legal and political relations between the EU, Ukraine and Russia¹. Following the proclamation of independence of the Crimea and its accession to Russia, and in the presence of the conflict between the Kyiv Government and the self-proclaimed Republics of Donetsk and Lugansk, the issue of the EU relations with Ukraine and Russia has become one of the hottest political issues at a global level.

Brussels, Kyiv and Moscow are not united by trilateral agreements. Russia is the EU's largest neighbour and its third biggest trading partner. In 1991 the EU and Russia stipulated a *Partnership and Cooperation Agreement* (PCA); in 2003 they agreed to reinforce their cooperation by creating in the long term four 'common spaces': economic, covering also the environment; freedom, security and justice; external security, including crisis management and non-proliferation; research and education. This, however, doesn't reflect the increasing breadth of the EU - Russia relations since the early 1990's. Negotiations on a new agreement providing for a more

¹ See *EU-Ukraine-Russia Relations: Problems and Prospects*, Razmkov Centre, National Security and Defence, no. 4-5, 2012. Articles on: *EU-Ukraine-Russia: Political Dimension of Relations*; *State of Execution of the Action Plan on Visa Liberalisation (APVL) provided by the EU to Ukraine on 22 November 2010 - Results of Civic Monitoring*; *Economic Relations in the EU-Ukraine- Russia Triangle*; *EU-Ukraine- Russia Energy "Triangle": Dependency, Interests, Contradictions*; *Security Dimension of EU-Ukraine- Russia Relations*; *Humanitarian Dimension of EU-Ukraine- Russia Relations*; *Conclusions and Proposals*. Interviews: J. SHERR, *Ukraine, Russia, Europe*; S. Pifer, *Ukraine's Foreign Policy: Losing Its Balance*; A. PIONTKOVSKY, *Ukraine between Russia and the EU*; B. KHEIFETS, *Russia's Economic Interaction with Ukraine and the EU States for the Sake of Modernisation: A Corporate Perspective*; V. YURCHYSHYN, *Risks of Involving Ukraine in the Sphere of Russia's Economic Interests*; L. SHANGHINA, *The Dichotomy of Russkiy Mir for Ukraine*.

comprehensive framework were launched in 2008, but the dialogue between the two Parties has been made difficult by the critical attitude of the EU on the state of democracy in Russia and the differences of opinion on regional security². Contacts are also burdened with competing integration projects in the post-Soviet area; therefore, an eventual Russian membership of the EU has never been a topic on the agenda and seems to be not economically feasible.

Ukraine is a priority partner in the framework of the EU *Eastern Partnership*, considered by Russia as an EU attempt to expand its “sphere of influence”.

An innovative *Association Agreement* between the EU and Ukraine, negotiated between 2007 and 2012, is at the origin of the current crisis: in November 2013, when the Ukrainian Government decided to suspend its signing, there were huge protest demonstrations. Among the main subsequent events, there were the government changes and the new presidential and general elections; the Crimea’s declaration of independence and its annexation to Russia, condemned by the EU for the violation of the sovereignty and territorial integrity of Ukraine; the conflict between the Government of Kyiv and the Eastern regions of Donetsk and Lugansk, where referendum on the autonomy were held³.

However, the Association Agreement was finally signed by the EU and Ukraine on 27th June 2014 and the provisional application of some important parts started on 1st November, while the provisional application of the *Deep and Comprehensive Free Trade Area* (DCFTA) has been delayed until 1st January 2016, in order to facilitate the overall efforts towards a peace process.

The research I have carried out concerns the legal and political aspects of the triangular relations between the EU, Ukraine and Russia. Its main objectives were the analysis and evaluation of: *a)* the legal value of the declaration of independence of the Crimea and its annexation to Russia; *b)* the nature of the ongoing conflict between the Government of Kyiv and the self-proclaimed Republics of Donetsk and Lugansk; *c)* the EU's position on the crisis in Ukraine, taking into account the interests and orientations of its Member States; *d)* the implications of the crisis on the global geo-political scenarios, particularly with regard to relations between the EU, United States and Russia.

² Cfr. P. A. KALINICHENKO, *The Development of Legal Framework for Russia - EU Relations. 2010 Results*, in *Baltic Region*, 2011, 3, pp. 27-33.

³ See *Affari Esteri*, 174, spring 2014. Articles by A. ALBONETTI, *L'Ucraina e la pace, il TNP e l'epoca nucleare*; F. MOGHERINI, *Alle violazioni di Mosca occorre reagire*; H. A. KISSINGER, *Quel ponte di Kiev tra Est e Ovest*; B.-H. LÉY, *La lezione di Kiev all'Occidente*; F. SALLES, *La crisi dell'Ucraina*; G. B. VERDERAME, *L'annessione della Crimea alla Russia*; P. MIGLIAVACCA, *Su Mosca soffia il vento dell'Est*; M. DE MEDICI, *L'Ucraina e il nuovo bipolarismo*; M. GIACONI, *Il Grande Gioco dell'Ucraina*.

2. *Research activity*

In September 2014, I started to analyse the state and prospects of the evolving relations between the EU, Russia and Ukraine in the light of international law and in the context of the EU's foreign policy. In particular, I put a focus on the *Crimean conundrum*⁴ and on the scope and content of the Association Agreement between the EU and Ukraine.

A work trip to Kyiv and some talks held there with colleagues, experts and diplomats, first of all the Italian Ambassador, allowed me to better comprehend the orientations of the Kyiv Government, and position and interests of some EU Member States (Italy in the forefront⁵) on the main open issues, especially with regard to the status of the Crimea, and the implications (and limits) of non-recognition of the Crimea's independence⁶.

Then, thanks to the STM Programme, from 18th November to 8th December 2014 I developed my research at the Graduate School for East and South East European Studies, and the IOS - Institute for East and Southeast European Studies, in Regensburg (Bavaria, Germany), which is member of the Graduate School. The Graduate School is a very prestigious observatory on EU policies towards the countries of Eastern Europe; a characterizing goal of the institution is the promotion of national and international networks, and its primary objective that of providing the very best facilities for research and doctoral work. The IOS carries out, in close cooperation with partners in Germany and abroad, transnational and comparative oriented research.

Therefore, the Graduate School and the IOS offer an excellent international environment for conducting specialized interdisciplinary research and I have had the chance to analyze in depth the historical background of the Association Agreement, its main features and characters, and foreseeable implementation issues; as well as the German economic interests at stake, and the position and fears of Russia related to the strengthening of the political and economic relationships between the EU and Ukraine.

⁴ See M. ARCARI, M. ROSCINI, *International Law and the 'Crimean Conundrum': Legal issues arising from the 2014 Russia/Ukraine crisis*, May 11, 2014.

⁵ See *L'Italia e i Vicini Orientali dell'Unione Europea*, ISPI - Istituto per gli Studi di Politica Internazionale, Progetto per il MAE, marzo 2011.

⁶ See E. MILANO, *The Non-Recognition of Russia's Annexation of Crimea: Three different legal approaches and one unanswered question*, May 11, 2014; A. TANCREDI, *The Russian Annexation of the Crimea: Questions relating to the use of force*, May 11, 2014.

I have also had the chance to present and discuss in an international environment the first findings of my research. The IOS in fact organized a *Forum* on the Association Agreement between the EU and Ukraine, considered to be the first of a new generation of agreements with Eastern Partnership countries, and asked me to be the speaker.

With the support of a multimedia presentation, I talked about ■ the political and legal background of the Agreement, ■ its legal basis, ■ the provisional application of some parts, ■ the territorial scope of application, and ■ the main principles it states. Finally, I examined ■ the principal issues concerning its implementation.

3. *Some notes on the Association Agreement between the EU and Ukraine*

The Joint Declaration on the EU - Ukraine Association Agreement adopted by the EU - Ukraine Summit held in Paris in September 2008 recognizes that Ukraine, as a European country, shares a common history and common values with the countries of the EU. The Summit was pleased of the choice to stipulate an association agreement, which leaves open the way for further progressive developments in bilateral relations.

The Agreement, which replaces the 1994 *Partnership and Cooperation Agreement*, may be considered the last result of a cooperation developed since the beginning of 90's, first in the framework of the *European Neighbourhood Policy* (ENP), than of the *Eastern Partnership*. It aims to deepen political and economic relations between the EU and Ukraine, and to gradually integrate Ukraine into the EU internal market⁷.

It is important to underline that, in line with the evolving principles guiding EU foreign policy, one of the main characters of the Agreement is the so-called *democratic conditionality*. Before the 90s, all EC economic agreements were instead inspired by the so-called "ideological neutrality": the EC, in entertaining relations, did not take into account if the third State was or was not respectful of human rights, the rule of law, democracy. In 1991 European Council held in Luxembourg introduced a new policy, confirmed by Article 6 of the 1992 Treaty of Maastricht, indicating the parameters that would guide the action of the EC with third countries. Since then, the situation have been changing dramatically. Co-operation has become the primary instrument for the promotion outside of the values of democracy, respect for human rights and affirmation of the rule

⁷ The DFCTA will go further than classic free trade areas, as it will both open up markets, but also address competitiveness issues and the steps needed to meet EU standards.

of law; financial aid have been granted to third State under the condition of the undertaking of agreed policies on human rights, democratic development, protection of minorities, and so on⁸. This might be represented as a shift from the “ideological neutrality” to the “democratic conditionality”.

a) The Association Agreement is the first agreement based on political association between the EU and any of the Eastern Partnership countries, and is unprecedented in its breadth (number of areas covered) and depth (detail of commitments and timelines)⁹.

According to Herman Van Rompuy, it is “the most advanced agreement of its kind ever negotiated by the EU” and served to a large extent as a template for the agreements with Moldova and Georgia. Reforms are foreseen in a number of key areas: public governance, justice, law enforcement, consumer protection, and economic sectors such as: energy, transport, environmental protection, industrial development, social development and protection, education, youth, culture

The comprehensive and complex nature of the Association Agreement is reflected in the choice of legal basis. The Council Decision on the signing and provisional application of the political provisions, adopted on 17 March 2014, combines the legal basis for EU action in the area of Common Foreign and Security Policy (Articles 31,1, and 37, *Treaty on the EU*) with the traditional provision on association (Article 217, *Treaty on the Functioning of the EU*).

The Decision not refer to Article 8 of the Treaty on the EU (*The Union and Its Neighbours*), introduced by the Treaty of Lisbon, which endows the Union with an explicit competence to develop a special relationship with neighbouring countries, aiming at establishing an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations¹⁰. According to some authors, this is due to the fact that anything less than

⁸ This requires the inclusion of conditionality clauses in the agreements, according to which if the third State violates standards of human rights or is guilty of serious violations of human rights, the EU reserves the right to suspend or terminate the agreement.

⁹ It is articulated in a Preamble, seven Titles (*General Principles; Political Dialogue and Reform; Cooperation in the Field of Foreign and Security Policy; Justice, Freedom and Security; Economic and Other Sector Cooperation; Trade and Trade-related Matters; Financial Assistance and Anti-Fraud and Control Provisions; Institutional General and Final Provisions*), and various Annexes and Protocols.

¹⁰ Cfr. M. COMELLI, N. PIROZZI, *La politica estera dell'Unione europea dopo Lisbona*, IAI - Istituto Affari Internazionali, Osservatorio di Politica internazionale, 72, 2013.

formal association based on Article 217 TFEU would have been perceived by the Eastern neighbours as an enhancement of their existing treaty relations¹¹.

b) Treaty provisions in areas including the respect for human rights, fundamental freedoms and rule of law; political dialogue and reform; justice, freedom and security; economic and financial cooperation are provisionally applied since 1st November 2014.

The provisional application of the DFCTA - *Deep and Comprehensive Free Trade Area* has been delayed until 1st January 2016, as part of the overall efforts towards a comprehensive peace process in Ukraine. However, the EU will continue the application of autonomous trade measures for the benefit of Ukraine until the end of 2015, granting Ukrainian exporters preferential access to EU markets without awaiting entry into force of the trade provisions under the Association Agreement¹².

It must be noted that the Presidents of the European Commission, Russia and Ukraine have agreed to hold Trilateral Consultations on the Association Agreement, the DFCTA and their possible negative effects on Russia. During the first round of consultations held in Brussels on 11th July 2014, the Parties agreed that implementation of the Agreement will modify trade and investment conditions on the Ukrainian market and may have negative consequences for trade between Ukraine and Russia. The second round of consultations was held in Brussels on 12th September 2014; Moscow presented a document containing proposals to amend the Association Agreement, in order to minimize the costs to the Russian economy of its coming into force. The document contains a number of demands for far-reaching changes¹³.

c) Another important issue is that of the territorial scope of application of the Association Agreement. In fact, while the Association Agreements with Georgia and Moldova include a specific

¹¹ See R. PETROV, *Association Agreements with Ukraine, Moldova and Georgia through the Lens of Consistency*, report presented at the International Workshop on: “The EU and Its Values in Its Neighbourhood - Contestation and Consistency”, Pisa, 3rd October 2014.

¹² Ukraine will also benefit from the preferences of the CIS (Commonwealth of Independent States) free trade zone by the end of 2015.

¹³ Russia has called for the plan to liberalize tariffs on over 20% of the goods categories to be dropped, and for changes in the provisions relating to policies on customs, energy, and standards.

general provision on the “territorial application”, stating that “the application of the DFTA in relation to those areas over which the Government (of Georgia / Moldova) does not exercise effective control”, “shall commence once Georgia / Moldova ensures the full implementation and enforcement of this Agreement, or of its DFCTA, respectively, on its entire territory”, the Association Agreement between the EU and Ukraine doesn't address the issue.

EU and Ukraine agreed however, in the Final Act, that *the Association Agreement shall apply to the entire territory of Ukraine as recognized under international law* and they “shall engage in consultations with a view to determine the effects of the Agreement with regard to the illegally annexed territory of the Autonomous Republic of Crimea and the City of Sevastopol in which the Ukraine Government does not exercise effective control”¹⁴. At the moment, to overcome the problem of treatment of products exported from the region, the EU has prohibited the imports of goods from Crimea and Sevastopol (23.6.2014)¹⁵.

d) Passing to the principles affirmed, the Agreement puts a strong emphasis on democracy and the rule of law, human rights and fundamental freedoms, good governance, a well-functioning market economy and sustainable development.

It contains numerous provisions affirming in particular the principles of independence, sovereignty, territorial integrity and inviolability of borders. The Parties declare their commitment to the promotion of those principles in the Preamble, and to the promotion of their respect in Article 2 (Title I, *General Principles*), according to which they constitute essential elements of the Agreement.

Furthermore, the strengthening of political dialogue between the Parties in all areas of mutual interest should "promote gradual convergence on foreign and security matters with the aim of Ukraine's ever-deeper involvement in the European security area" (Article 4, *Aims of Political Dialogue*, Title II, *Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy*) and among the principal aims of the

¹⁴ A future law should then determine the status of Ukrainian nationals and companies residing in Crimea and Sevastopol with regard to the implementation of the Association Agreement.

¹⁵ It must be taken into account that, in practice, only Russian authorities are able to issue the relevant origin certificates for products manufactured or processed in Crimea, and - as stated by the Court of Justice - the EU cannot accept the proof of origin issued by authorities other than those designed by name in the relevant agreement.

political dialogue shall be the promotion of the principles of independence, sovereignty, territorial integrity and the inviolability of borders (Article 4, 2, g).

The relevant provisions of the UN Charter and the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe are also recalled (Article 7, *Foreign and Security Policy*, 2). In this regard, we may observe that the EU has strongly condemned the illegal annexation of Crimea and Sevastopol to the Russian Federation and “will not recognize it”¹⁶. On its side, Ukraine regards the territory of Crimea as a “temporary occupied territory”¹⁷.

e) Finally, with regard to the issues concerning the implementation of the Association Agreement, it is opportune to observe that, according to Article 9 of the 1996 Constitution of Ukraine, the conclusion of international treaties that contravene the Constitution is possible only after introducing relevant amendments to the Constitution itself; while international treaties that are in force, agreed to be binding by the Verkhovna Rada, are part of the national legislation.

Some of the Association Agreement provisions impose commitments on Ukraine that might be argued directly contradict the national constitution. For instance, Article 8 of the Agreement binds Ukraine to ratify and implement the *Rome Statute on the International Criminal Court* and its related instruments, whereas in a judgment of 11th July 2001, the Constitutional Court of Ukraine concluded that several provisions of the Rome Statute were not in conformity with the national Constitution. In particular, the provision in Article 1 of the Statute that “[the International Criminal Court] shall be complementary to national criminal jurisdictions” has been considered contrary to provisions of the Constitution which prohibit delegation of judicial powers to other bodies than the Ukrainian courts and establishment of new courts that are not provided in the Constitution¹⁸.

¹⁶ European Council, Conclusions, Brussels, 20/21 March 2014.

See A. FERRARI (ed.), *Oltre la Crimea - Russia contro l'Europa ?*, ISPI - Istituto di Studi di politica internazionale, Milano, 2014, Preface by P. MAGRI; Articles by: A. FERRARI, *Crimea: una svolta per la politica estera russa ?*; T. PENKOVA, *La strategia del Cremlino in Ucraina*; G. RINALDI, *Mosca e Kiev: i vincoli dell'economia*; A. VITALE, *Il potere in Russia: continuità e trasformazioni*; S. GIUSTI, *Europa - Russia/1: perché è così difficile capirsi*; M. VERDA, *Europa - Russia /2: una convivenza energetica*; M. DEL PERO, *Usa - Russia: dal “reset” a una nuova Guerra fredda ?*.

¹⁷ *Law on Protection of Rights and Freedoms of Nationals and Legal Regime on the Temporary Occupied Territory of Ukraine*, 15.4.2014, no. 1207

¹⁸ Ruling nr. 1-35. On 22nd May 2014 Interim President of Ukraine Oleksandr Turchynov asked the Constitutional Court of Ukraine to rule on constitutionality of ratification of the Rome Statute.

A specific issue may arise from the binding decisions of the Association Council established by the Association Agreement. International agreements lack of direct enforceability in the Ukrainian legal order and the Council Decision on the signing and provisional application of the Agreement unequivocally provide that it “shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals”

In general, the implementation will require a broad and detailed work of approximation of the Ukrainian laws to the EU regulations. In the meantime, it is desirable that the Ukrainian authorities will adopt the so-called ‘Euro-friendly interpretation’ principle, according to which the government and judiciary should acknowledge an obligation to interpret the existing national legislation in such a way as to ensure the greatest degree of compatibility with the EU norms.

4. Knowledge exchange at the Graduate School

Besides the debate following the Forum on the Association Agreement, I participated and I found inspiring some events organized by IOS, first of all the conference of Vasyl Filipchuk on: *Multi- Vector Nature of Ukraine's Foreign Policy since 1991* (5th December), and the talk on *The Situation in the Eastern Regions of Ukraine* delivered by Oleksandr Zahirko (27th November), both coming from Ukraine.

It was also inspiring the event organized, on the occasion of the centenary of the outbreak of the First World War, for the presentation of the European Art and Culture Project “SHARE - Too Much History, MORE Future“ (27th November). This Project, launched by the Federal Chancellery of the Republic of Austria, resulted in an impressive collection of short films realized by twelve well-known contemporary artists from Bosnia-Herzegovina. As it has been observed during the event, *unexpectedly, the centenary of the First World War brought back the war in Europe; much of what is occurring in Ukraine fatally recalls the escalation dynamics of former Yugoslavia .. Thus, we should ask ourselves which lessons we could take from the wars in Croatia or Bosnia, in order to avoid the reiteration of such a catastrophe* (ULF BRUNNBAUER, IOS, Director).

In addition to those events, I found of a certain interest the lectures on: *Possible Economic Effects of the Carbon Tax in Ukraine*, held by Miriam Frey (18th November) and the lecture on: *Analysis of the Effects of Kazakhstan's Customs Union Membership with Belarus and Russia*, held by Lyazzat Nugumanova (2nd December). The last one highlighted, among other things, some

implications deriving from participation in the Customs Union, which for Ukraine represented an alternative to the integration in the EU internal market.

The lecture on: *The International Control Commission of Albania (1913 - 1914) - an organization of great powers, which should save the international peace*, held by Kristian Casplar - Degovics (4th December), showed a possible precedent to be taken into account in the efforts to identify appropriate bodies and procedures for carrying out a peace process in Ukraine.

Finally, daily exchanges of views with the staff of the Graduate School and of the IOS, as well as with other visiting scholars, confirmed my doubts on recurrent affirmations according to which geopolitical competition of the EU and Russia in the post-Soviet space would be the main problematic factor¹⁹ on the scene, and the Association Agreements with Georgia, Moldova and Ukraine would be not just any other agreements – but milestones in the history of Europe as a whole. The competition between the United States and Russia is clearly emerged as the principal factor influencing the dynamics of the Ukrainian crisis, while an evaluation of the historical importance of the three Association Agreements requires some cautions, considering risks and uncertainties related to their effectiveness and follow-up.

5. Conclusion

The research stay at IOS has been really important for developing my research on the state and prospects of relations between the EU, Russia and Ukraine with a multidisciplinary approach.

I have analysed in depth, in the light of international law and in the context of the EU's foreign policy, the development of the legal and political relations between the EU and Ukraine. I have also identified and evaluated issues concerning the status of Crimea in international law, and aims and characterizing elements of the 2014 Association Agreement. Finally, I have analysed the position and interests of some EU Member States, Germany and Italy in the forefront, on open issues from the Ukrainian crisis.

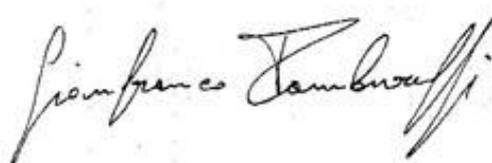
¹⁹ *La Russia nel puzzle euroasiatico*, in *Italianieuropei*, 4, 2014, pp. 145-176. Articles by: P. FERRARA, *Geocultura vs. geopolitica ? La Russia e il partneriato orientale*; S. MEISTER, *Imparare dalla crisi: l'Ucraina, la Russia e l'Unione Europea*; A. ETKIND, *La controrivoluzione preventiva di Putin*; D. POMMIER VINCELLI, *Il revisionismo russo e l'Unione euroasiatica*; M. DEL PERO, *Obama, la crisi ucraina e le relazioni tra Russia e Stati Uniti*.

However, further investigation should be carried out on themes such as the legal nature of ongoing conflicts between the Government of Kyiv and the self-proclaimed Republics of Donetsk and Lugansk; the likely impacts of the Ukrainian crisis on EU Member States, particularly those neighbouring Ukraine; the effectiveness and the efficiency of all the three new Association Agreements. As noted, the Association Agreement between the EU and Ukraine - characterized by three specific features: comprehensiveness, complexity and conditionality - is unprecedented in its breadth and depth; but, is it an innovative legal instrument providing for a new type of integration without membership ?²⁰.

Finally, I would like to underline that the themes of this research and my first findings have met the interests of numerous colleagues and institutions, in Italy and abroad. At my Institute (ISGI - CNR), the possibility to launch, in cooperation with various institutions, a new research project on the theme of *EU Foreign Relations: Eastern Partnership and Russia* is under consideration.

Abroad, the Taras Shevchenko National University of Kyiv has decided to activate, in cooperation with ISGI, at the Faculty of Law, an optional Course on *EU Foreign Relations: The Eastern Partnership and the New Associations Agreements*; the Department of International Law and Law of Foreign Economic Relations of the Law Faculty of the State University of Chisinau agreed with ISGI on a draft project concerning *Legal and Political Relations of Italy and the EU with Moldova: The Association Agreement between the EU and Moldova*; the IOS has decided to establish an international research group on *Territorial Conflicts in the Post-Soviet and Post-Yugoslav Spaces*.

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²⁰ G. VAN DER LOO, P. VAN ELSUWEGE, R. PETROV, *The EU - Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, European University Institute, EU Working Papers, 9, 2014.